ARUMUGAM PERIASAMY

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: W-05-5-1999]
9 APRIL 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking in dangerous drugs - Whether trial judge erred in invoking s. 37(d) and 37(da) Dangerous Drugs Act 1952 - Whether proviso to s. 60 Courts of Judicature Act 1964 applicable - Whether appellant transporting proscribed drugs within definition of s. 2 Dangerous Drugs Act 1952 - Whether conviction ought to be quashed - Dangerous Drugs Act 1952, ss. 2, 37(d), 37(da)*

This was an appeal by the appellant against the decision of the learned trial judge convicting him of an offence under s. 39B of the Dangerous Drugs Act 1952 ('the Act'). The police ambushed and arrested the appellant, who was riding a motorcycle at the material time, when he arrived at a petrol station. There was a package in the carrier basket of the motorcycle. The appellant was detained after a struggle and the package was recovered. A subsequent medical examination revealed the package to contain a mixture of 68.5 grams of heroin and monoacetylmorphine. The appellant was then charged and convicted for trafficking in the aforesaid drugs. Before the instant court, the appellant submitted that the learned trial judge had erred in invoking s. 37(d) of the Act, and further, by thereafter proceeding to apply s. 37(da). The appellant's first argument was that the motorcycle which the appellant rode into the petrol station was not "anything whatsoever containing" within the meaning of the phrase in s. 37(d) of the Act, rendering the presumption under s. 37(d) unavailable to the prosecution. The appellant's second argument was that the learned judge, having rightly or wrongly invoked the presumption under s. 37(d) of the Act, erred in applying s. 37(da) in an automatic sequence. The learned deputy, however, invited the court to apply the proviso to s. 60 of the Courts of Judicature Act 1964 ('the CJA'). He also referred the court to s. 2 of the Act in which the expression "trafficking" has been defined and which included "transporting". His argument was that the appellant was transporting the proscribed drugs in the present case and, therefore, came within the definition under s. 2 of the Act.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] In respect of the appellant's first argument, the learned trial judge did in fact undertake an analysis of the facts and surrounding circumstances after which he concluded that the appellant was in possession of the proscribed drugs in question. The closeness of the appellant to the package was sufficient evidence to warrant an inference of custody and control, and that independent of the presumption. The learned trial judge was thus correct in concluding that the appellant was in possession of the drugs. (p 691 g-h)

[2] In respect of the appellant's second argument, when the High Court judgment was read as a whole, it was open to the interpretation that the learned trial judge acted on the presumption under s. 37(d) and 37(da) of the Act to convict the accused, which was an infringement of the rule in *Muhammed Hassan v. PP*, the authority for the proposition that it would be an error of law to use the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof. (pp 692 h & 693 a, g)

[3] It would be amiss to apply the proviso to s. 60 of the CJA since that proviso is only to be invoked in exceptional circumstances as pointed out by the Federal Court in *Tunde Apatira v. PP*. Since there was nothing exceptional about the facts of the present case, there was no reason to invoke the proviso. (pp 694 g-h & 695 c)

[4] In respect of the learned deputy's argument that the appellant was transporting the proscribed drugs in the present case, this court, with respect, did not agree. In the first place, the prosecution's case in the court below was never proceeded with or argued on the footing that the appellant was guilty because he was "transporting" the drugs in question. It would, therefore, be a procedural injustice and even perhaps a substantial injustice to permit it to change tack and plead a different case before this court. Secondly, in any event, the evidence relied upon by the prosecution in the court below was confined to the discovery of the drugs in the carrier of the motorcycle. No evidence was led beyond that. Accordingly, this court must not only hearken to the definition of trafficking under s. 2 of the Act but also to the operative words with which that section opens. It says "in this Act unless otherwise requires" and these words defined in s. 2 of the Act are to take effect and are to be applied accordingly to the factual context of each case. If the context does not admit of the definition, then the words do not have application to the particular facts. (p 695 d-g)

[5] For these reasons, this court was unable to accept the argument of the learned deputy. Based on the decision in the case of *Muhammed Hassan (supra)*, this appeal was allowed. The conviction under s. 39B of the Act was quashed and the death sentence substituted with a conviction under s. 12(2) read with s. 39A(2) of the Act. (p 696 c)

[6] Taking into account all the relevant considerations pertaining to the offence, its prevalence and the public interest, the appellant was sentenced to a term of 18 years' imprisonment from the date of arrest and 10 strokes of the rotan. (p 696 g)

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim bicara kerana mensabitkannya atas kesalahan di bawah s. 39B Akta Dadah Berbahaya 1952 ('Akta'). Pihak polis telah menyerang-hendap dan menangkap perayu, yang ketika itu sedang menunggang motosikal, apabila beliau tiba di sebuah stesyen minyak. Terdapat satu bungkusan di dalam raga motosikal. Perayu ditahan selepas satu pergelutan dan bungkusan dirampas. Pemeriksaan kimia kemudiannya menunjukkan bahawa bungkusan mengandungi campuran heroin dan monoacetylmorphine seberat 68.5 gram. Berikutnya, perayu dituduh dengan kesalahan mengedar dadah berkenaan dan disabitkan. Perayu mengatakan bahawa yang arif hakim bicara khilaf kerana menggunapakai secara berturut-turut s. 37(d) dan 37(da) Akta. Hujah pertama perayu adalah bahawa motosikal yang ditunggang olehnya ke stesyen minyak bukanlah "anything whatsoever containing" seperti yang dimaksud oleh ungkapan di dalam s. 37(d) Akta, sekaligus menolak penggunaan anggapan di bawah s. 37(da) Akta oleh pendakwaan. Hujah kedua perayu adalah bahawa yang arif hakim, setelah dengan betul atau salahnya menggunapakai anggapan s. 37(d) Akta, telah khilaf apabila menggunakan s. 37(da) dengan secara automatik. Yang arif timbalan, bagaimanapun, menjemput mahkamah untuk mengguna proviso kepada s. 60 Akta Mahkamah Kehakiman 1964 ('CJA'). Beliau juga merujuk mahkamah ini kepada s. 2 Akta, yang mentafsir perkataan "mengedar" sebagai termasuk "membawa". Hujahnya adalah bahawa dalam kes ini perayu telah membawa dadah terlarang tersebut, yang bererti ia dirangkum oleh s. 2 Akta.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Berkaitan hujah pertama perayu, yang arif hakim bicara sememangnya telah menganalisa fakta-fakta dan halkeadaan yang wujud selepas mana beliau merumuskan bahawa perayu mempunyai milikan dadah terlarang tersebut.

Kedudukan rapat perayu dengan bungkusan adalah bukti yang mencukupi bagi membangkitkan andaian milikan dan kawalan, yang bebas dari anggapan. Yang arif hakim dengan itu betul apabila memutuskan bahawa perayu mempunyai milikan dadah tersebut.

[2] Berhubung hujah kedua perayu, membaca keputusan Mahkamah Tinggi secara keseluruhan, adalah terbuka untuk mentafsirkan bahawa yang arif hakim telah mensabitkan perayu berdasarkan kepada anggapan s. 37(d) dan 37(da), yang mana ini menyanggahi kaedah di dalam *Muhammed Hassan v. PP*, yang merupakan autoriti bagi proposisi bahawa adalah menjadi kesilapan undang-undang untuk menggunakan anggapan milikan di bawah s. 37(d) Akta bagi membangkitkan anggapan mengedar di bawah s. 37(da).

[3] Mahkamah ini harus menolak jemputan untuk menggunakan proviso kepada s. 60 CJA oleh kerana proviso tersebut hanya boleh dipakai dalam keadaan yang istimewa sahaja, sepertimana yang dikatakan oleh Mahkamah Persekutuan di dalam *Tunde Apatira v. PP*. Oleh kerana tiada apa-apa keistimewaan pun pada kes semasa, maka tiada alasan untuk menggunapakai proviso ini dan mahkamah menolak menggunakannya atas budibicara yang ada padanya.

[4] Mahkamah ini, dengan hormat, tidak bersetuju dengan hujah yang arif timbalan bahawa perayu dalam kes semasa telah membawa dadah terlarang tersebut. Pertama, kes pendakwaan di mahkamah di bawah tidak pernah berjalan atau dihujah atas dasar bahawa perayu bersalah kerana dia "membawa" dadah tersebut. Ia, dengan itu, menjadi suatu ketidakadilan prosedur, malah mungkin suatu ketidakadilan berat, untuk membenarkan pendakwaan menukar haluan dan memplid suatu kes yang berbeza di mahkamah ini. Kedua, keterangan yang disandarkan oleh pendakwaan di mahkamah di bawah adalah terhad kepada penemuan dadah di dalam raga motosikal. Tiada keterangan dikemukakan selain dari itu. Oleh yang demikian, mahkamah ini bukan sahaja harus menumpu kepada definasi mengedar di bawah s. 2 Akta tetapi juga kepada perkataan operatif pada pembukaan seksyen tersebut. Ia menyatakan "in this Act unless otherwise requires" dan perkataan-perkataan ini yang ditafsir oleh s. 2 Akta hendaklah berkuatkuasa dan digunapakai kepada konteks faktual sesuatu kes. Jika konteksnya tidak menerima pentafsiran sedemikian, maka perkataan-perkataan tersebut tidak terpakai kepada fakta-fakta tertentu tersebut.

[5] Atas alasan-alasan ini, mahkamah tidak dapat menerima hujah yang dikemukakan oleh yang arif timbalan. Rayuan dengan itu dibenarkan berdasarkan kepada keputusan kes *Muhammed Hassan (supra)*, dan sabitan di bawah s. 39B Akta dibatalkan dan diganti dengan sabitan di bawah s. 12(2) dibaca bersama s. 39A(2) Akta.

[6] Hukuman mati yang dijatuhkan juga adalah diganti. Mengambilkira semua faktor relevan, kemaslahatan awam dan kemelataan kesalahan seperti ini, perayu dihukum 18 tahun penjara dari tarikh ditangkap dan 10 sebatan.

Perintah sekadarnya.]

Case(s) referred to:
Ang Chai Seng v. PP [2000] 1 CLJ 213 CA ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(dist)***
Driscoll v. The Queen [1977] 137 CLR 517 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Foo Jua Eng [1966] 1 MLJ 197 ***(refd)***
PP v. Letchumanan [2000] 4 CLJ 685 HC ***(refd)***
Tunde Apatira v. PP [2001] 1 CLJ 381 FC ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), 37(da), 39A(2), 39B
Federal Constitution, art. 8(1)

For the appellant - Karpal Singh (M Sathia with him); M/s Karpal Singh & Co
For the respondent - Muhamad Iskandar Ahmad DPP

[Appeal from High Court, Kuala Lumpurl Criminal Trial No: 45-36-98]

Reported by Suresh Nathan

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

The appellant was convicted for an offence under s. 39B of the Dangerous Drugs Act 1952 ("the Act"). He has appealed to us. The facts are not in dispute and may be shortly stated.

On 23 September 1997 at 3.45pm, a police party led by ASP Giam Kar Hoon (PW3) laid an ambush at a Petrol Station situated at 4½ milestone, Jalan Genting Klang, Setapak. At about the time, the appellant arrived at the petrol station. He was riding a motorcycle. There was a carrier basket on the motorcycle and it was located below the handlebars. In it was a package. Upon the accused's arrival, PW3 gave orders to his police party to accost the accused and to apprehend him. The police party, none of whom were in uniform, then rushed forward. There is evidence of a struggle and an attempt by the appellant to escape. However the appellant was detained and the package recovered. Subsequent chemical examination revealed the package to contain a mixture

of 68.5 gm of heroin and monoacetylmorphine. The appellant was then charged and convicted, as we observed at the commencement of our judgment, for trafficking in the aforesaid drugs.

Learned counsel for the appellant has argued two additional grounds admitted on a motion before us this morning. He has confined himself to these grounds. His submissions on those grounds are that the learned trial judge erred in invoking s. 37(d) of the Act and further by thereafter proceeding to apply s. 37(da). Now s. 37(d) and (da) read as follows:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drugs shall, until the contrary is proved, be deemed to have been in possession of such drug and shall until the contrary is proved, be deemed to have known the nature of such drug.
>
> (da) any person who is found in possession of:
>
> (i) 15 grammes or more in weight of heroin;
>
> (ii) 15 grammes or more in weight of morphine;
>
> (iii) 15 grammes or more in weight of monoacetylmorphine;
>
> (iiia) a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphine or a total of 15 grammes or more in weight of any two of the said dangerous drugs;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Mr. Karpal Singh's first argument is that the motorcycle which the appellant rode into the petrol station was not "anything whatsoever containing" within the meaning of the phrase in s. 37(d). In support of this argument, Mr. Karpal Singh has referred us to *Public Prosecutor v. Letchumanan* [2000] 4 CLJ 685 where, at p. 689, Augustine Paul J addressed the identical question as follows:

> The question to be decided is whether a vehicle, which would include a motorcycle, is capable of coming within the ambit of the words 'anything whatsoever containing any dangerous drugs' in the subsection. The question was answered by Thomson J (as he then was) in *Tong Peng Hong v. Public Prosecutor* [1955] MLJ 232 at p. 233:

> The words 'anything whatsoever' by themselves have as wide a meaning as any word can have but that meaning is governed and greatly restricted by the word 'containing'. A thing containing another thing is not synonymous with a thing in which that other thing is. To take an extreme example, it is not correct to say the earth contains the fly which at the moment is walking up the wall in my chambers. Both by derivation and usage the word 'containing' implies some measure of holding or restriction. The jar contains the jam but the cupboard contains the jar. In short, a container is not something in which another thing is. It is something which surrounds or holds another thing so as to prevent that other thing from being elsewhere.

It was accordingly held that a lorry does not come within the meaning of the words 'anything whatsoever containing' in the subsection. Similarly it has been held that a car (see *Syed Ali bin Syed Abdul Hamid & Anor v. Public Prosecutor* [1982] 1 MLJ 132) and a television set (see *Public Prosecutor v. Chan Peng Fatt* [2000] 1 MLJ 179) do not come within the subsection. In following *Tong Peng Hong*, Edgar Joseph Jr SCJ in writing for the (then) Supreme Court in *Public Prosecutor v. Lin Lian Chen* [1992] 2 MLJ 561 said at p. 567:

> In the first place, we would respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. Public Prosecutor* [1955] MLJ 232, that a vehicle in which a drug is carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drugs" and therefore in such a case, the presumption contained in s. 37(d) does not arise.

It is therefore my view that a motorcycle does not come within the meaning of the words 'anything whatsoever containing' in s. 37(d) of the Act. The presumption contained in s. 37(h) of the Act does not arise as the dangerous drugs were not found concealed in a specially constructed compartment of the motorcycle.

Mr. Karpal Singh therefore argues that the presumption under 37(d) was not available to the prosecution. The short answer to this argument is that the learned judge did in fact undertake an analysis of the facts and surrounding circumstances after which he came to the conclusion that the appellant was in possession of the proscribed drugs in question. For our part, we find the closeness of the appellant to the package is sufficient evidence to warrant an inference of custody and control and that independent of the presumption. See, *Public Prosecutor v. Foo Jua Eng* [1966] 1 MLJ 197. The learned judge was accordingly correct in concluding that the appellant was in possession of the drugs.

Mr. Karpal Singh's second argument is more formidable. He says that the learned judge, having rightly or wrongly invoked the presumption under 37(d), erred in applying s. 37(da) in automatic sequence. We have been referred to a passage in the learned judge's judgment which in our view merits reproduction:

> The evidence is clear that the dangerous drugs concerned were found in the carrier basket of the motorcycle that the accused was riding. His conduct at the petrol station is not consistent with that of a person arriving to purchase fuel, but appears to look for someone. It is clear that the incriminating substance, placed in an open carrier basket of the motor cycle, and located between him and the handlebars of the motor cycle, is in his custody or control. He cannot not know it was there. The fact there was a struggle or commotion, evidenced by the photograph of the fallen motorcycle, when he was arrested is some evidence that he has knowledge of the incriminating substance. There was no suggestion in the cross-examination that he had no knowledge whatsoever of the things in the carrier basket of the motor cycle. The accused therefore had possession of the incriminating substance.
>
> Given that the quantity of the dangerous drug found in the possession of the accused exceeds the threshold quantity of 15 grammes in section 37(da)(iiia) of the Dangerous Drugs Act, it is presumed, until the contrary is proved, that he is trafficking in the dangerous drugs. Such activity of trafficking constitutes the offence of trafficking in a dangerous drug under section 39B(1)(a) and punishable under section 39B(2) of the Dangerous Drugs Act.

There is a second passage which counsel also drew to our attention:

> Inherent in a charge of trafficking, the prosecution must prove beyond reasonable doubt that the accused, having possession, was actually trafficking. Otherwise a charge under section 39B must fail. There is a presumption under section 37(da)(iiia) of the Dangerous Drugs Act 1952 however, that a person having more than 15 grammes of either heroin, morphine or monoacetylmorphine, or 15 grammes of any two of them, is presumed to be trafficking. The presumption of trafficking may be displaced by the accused proving on a balance of probabilities that he was not trafficking. But the accused has not put in any such evidence. He relies entirely on the defence that he has no knowledge of the package of drugs in the basket-carrier of the motor cycle. For the reasons I have dealt with earlier, the accused has failed to raise a reasonable doubt, let alone proving to the contrary the presumption on a balance of probabilities.

Counsel argues that these passages are to be read together, and indeed when the judgment is read as a whole, it is open to the interpretation that the learned judge acted on the presumption under s. 37(d) and s. (da) to convict the accused. Having read the judgment carefully, we find that there is merit in this argument. The consequence of the aforesaid directions by the learned judge

which we have referred to and reproduced is, Mr. Karpal Singh says, an infringement of the rule in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170. That rule is to be discerned from the following passage in the judgment of the learned Chief Judge of Sabah & Sarawak appearing at pp. 194-195 of the report in that case:

> Having considered the submissions of counsel and the learned deputy public prosecutor, and the law applicable including the rules of construction of penal statutes, we were of the view that the word 'found' in s. 37(d) must bear the same meaning as the word 'found' in s. 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in s. 37(d).
>
> In our view, on the wording of s. 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s. 37(d) into s. 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as a general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This depends on the construction of the particular legislation. But a Court should be extremely cautious and slow to infer from a statute that Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in the criminal calendar. Any ambiguity in s. 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.
>
> We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of drugs reaches or exceeds the quantity specified in s. 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s. 37(da) which, of course is rebuttable.
>
> Accordingly, we held that the learned trial judge had erred in law in using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof.

Of course, once the judge fails to make a finding that an accused was "found in possession" of a proscribed drug, then it is not open to this court to make such a finding on the evidence. That much is clear from the following passage in the judgment of the learned Chief Judge of Sabah & Sarawak appearing at p. 195 of the report in *Muhammed Hassan*'s case:

> As regards the alternative submission of the learned deputy public prosecutor that, independently of s. 37(d), there was sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence, the learned trial judge did not make a finding of possession (ie possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at any conclusion in this regard.

Responding to the appeal, Encik Muhammad Iskandar deputy public prosecutor has argued that nothing turns upon the learned judge having invoked the presumption under s. 37(d) of the Act. He cites the case of *DPP v. Brooks* [1974] 2 All ER 840, an appeal from the Court of Appeal of Jamaica to the Privy Council. The learned deputy has argued that based on the opinion of Lord Diplock who delivered the advice of the Board on the occasion, the present appellant was rightly held to have physical custody and control of the drugs.

Brooks was a case decided under s. 7(c) of the Dangerous Drugs Law of Jamaica. In that case, the appellant was seated in the driver's seat of a van. There were several other people in the cab. On police officers approaching the van, the occupants fled and the respondent Brooks was apprehended. He was convicted in the first instance for unlawfully having in his possession 1000 lbs of ganja found in 19 sacks inside the van. His conviction was quashed by the Jamaican Court of Appeal. The Privy Council however allowed the appeal by the DPP of Jamaica and restored the conviction. Apart from being disadvantaged by the fact that we do not have the Jamaican provision before us, it also appears from the report of that case that the officers who approached the van were in uniform. That, was not, as we earlier pointed out, the case here. So, the fact that the respondent Brooks fled, whilst being a relevant circumstance on the facts of that case, has no parallel, so far as the instant appeal is concerned. In short, the 2 cases are distinguishable on the facts.

The learned deputy has also invited us to apply the proviso to s. 60 of the Courts of Judicature Act. With respect, we must decline the invitation. The proviso is only to be invoked in exceptional circumstances as pointed out by the Federal Court in *Tunde Apatira v. Public Prosecutor* [2001] 1 CLJ 381. In addition to the authorities cited in *Tunde Apatira*'s case, we would also refer to the following passage in the judgment of Barwick CJ in *Driscoll v. The Queen* [1977] 137 CLR 517, a decision of the High Court of Australia on the manner in which the provision is to be applied:

> Section 6 of the Criminal Appeal Act is identical in terms to those of s. 4(1) and (2) of the Criminal Appeal Act 1907 (UK). The meaning of the expression 'miscarriage of justice' as used in these sections has been elucidated over many years. It has in my opinion, correctly been said that the test of miscarriage in relation to the proviso to s. 6(1) is whether the court is satisfied that no reasonable jury, properly directed, could have failed to return a verdict of guilty on the evidence before it had it applied itself to the task in a proper manner, making in favour of the accused the presumption of innocence and bearing in mind the necessity that the charge be proved beyond all reasonable doubt: see *Reg. v. McGibbony* (10); or, put another way, that no reasonable jury properly directed could fail in the performance of their duty on the evidence before them to have convicted the accused of the charge laid against him.

There is, we may say nothing exceptional about the facts of the present case unlike those of *Tunde Apatira.* There is, therefore, no warrant to invoke the proviso and we decline to do so in the exercise of discretion conferred upon us.

The learned deputy also referred us to s. 2 of the Act in which the expression "trafficking" has been defined. That expression, according to its definition, includes "transporting". The learned deputy's argument is that the appellant was transporting the proscribed drugs in the present case and therefore comes within the definition. With respect, we do not agree. In the first place, the prosecution's case in the court below was never proceeded with or argued on the footing that the appellant was guilty because he was "transporting" the drugs in question. It will, therefore, be a procedural injustice, and even perhaps a substantial injustice to permit them to change tack and plead a different case before us.

Secondly, in any event, the evidence relied upon by the prosecution in the court below was confined to the discovery of the drugs in the carrier of the motorcycle. No evidence was led beyond that. Accordingly, we must not only hearken to the definition of trafficking under s. 2 but also to the operative words with which that section opens. It says "in this Act unless the context otherwise requires". These words mean that the words defined in s. 2 are to take effect and are to be applied accordingly to the factual context of each case. If the context does not admit the definition, then the words do not have application to the particular facts. This is a well-established canon of construction. As stated in *Bindra's Interpretation of Statutes,* 8th edn:

> It is, however, equally well settled that the meaning of the words used in any portion of the statute must depend upon the context in which they are placed. Moreover, in interpreting an enactment all its parts must be construed together as forming one whole and **it is not in accordance with sound principles of construction to consider one section, or group of sections, alone, divorced from the rest of the statute.** Further, so far as possible, that construction must

> be placed upon words used in any part of the statute which makes them consistent with remaining provisions and with the intention of the Legislature to be derived from a consideration of the enactment. The words may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In construing a particular section of an Act, one must look at the whole Act, and it is necessary to consider the context in which such section occurs so as, as far as possible, to make a consistent enactment of the whole statute. General words of a particular provision of a statute may be given a restrictive meaning if the context requires it. By 'context' is meant not only the textual context arising out of the other provisions of the statute, but also **the factual context** including the mischief to be remedied. (emphasis added.)

For these reasons, we are unable to accept the argument of the learned deputy. Based on the decision in the case of *Muhammed bin Hassan*, this appeal is allowed. The conviction under s. 39B is quashed and the sentence of death is set aside. In its place there is substituted a conviction under s. 12(2) read with s. 39A(2) of the Act.

Having heard arguments on sentence, we agree with the learned deputy that this is a serious offence in which the punishment must reflect the gravity with which we view such offences. What is paramount is the public interest. We have been referred to several authorities on the issue of sentence. Learned deputy referred to *Ang Chai Seng v. PP* [2000] 1 CLJ 213 whilst Mr. Karpal Singh referred us to *Chow Kok Keong v. PP* [1998] 2 CLJ 469. Mr. Karpal Singh however pointed out that the quantity of drugs in this case is less then the quantity found in *Chow Kok Keong*'s case. He says we ought to take that into account. But the appellant here is a foreigner. We think that he should respect our laws. Mr. Karpal Singh's answer is that all persons are equal before the law and are entitled to equal protection of the law under art. 8(1) of the Federal Constitution so that there should be no discrimination against the appellant on the ground that he is a foreigner. We do not think that that provision was intended by the framers of the Constitution to place an impediment in the way of a court considering sentence or when considering a plea in mitigation or a factor aggravating the offence when passing sentence. Taking into account all the relevant considerations pertaining to the offence, its prevalence and the public interest, we would accept the suggestion of the learned deputy and sentence the appellant to a term of 18 years imprisonment from date of arrest and to ten strokes of the rotan.

In conclusion, we would like to thank learned counsel and the learned deputy for the assistance rendered to us in this appeal.